

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

DONALD WRIGHT,) Case No. CV 15-9142-SVW (AS)
Petitioner,)
v.) **ORDER OF DISMISSAL**
RON RACKLEY, Warden,)
Respondent.)
_____)

BACKGROUND

On November 24, 2015, pro se Petitioner, in state custody, filed a "Martinez Motion Under Trevino vs. Thaler 133 S.Ct. (2013)." (Docket Entry No. 1). On December 10, 2015, Petitioner filed an "Amended Martinez Motion Under Trevino vs. Thaler 133 S.Ct. (2013)." (Docket Entry No. 3). On December 15, 2015, Petitioner filed a "Martinez Motion Under Trevino v. Thaler 133

1 S.Ct. (2013)",¹ which the Court construes as a Petition for Writ
 2 of Habeas Corpus by a Person in State Custody, pursuant to 28
 3 U.S.C. § 2254 ("Petition").² Petitioner challenges his 1994
 4 convictions in Los Angeles County Superior Court (Case No.
 5 TA030176).³ Petitioner alleges that he received ineffective
 6 assistance of counsel based on his appellate counsel's failure to
 7 raise the claim that the trial court failed to give him proper
 8 warnings and advisements under Faretta v. California, 422 U.S.
 9 806 (1975) prior to granting Petitioner's motion to represent
 10 himself. Petitioner contends that his appellate counsel's
 11 failure serves as "cause" for the procedural default on direct
 12 appeal. Petitioner further contends that the California Supreme
 13 Court's denial of Petitioner's habeas petition did not "clearly
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15 ¹ The Court will disregard Petitioner's prior pleadings.
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17 ² In Martinez v. Ryan, 132 S.Ct. 1309, 1320 (2012), the
 18 United States Supreme Court held that "a procedural default will
 19 not bar a federal habeas court from hearing a substantial claim
 20 of ineffective assistance at trial, if in the [State's] initial-
 21 review collateral proceeding, there was no counsel or counsel in
 22 that proceeding was ineffective."

23 In Trevino v. Thaler, 133 S.Ct. 1911, 1921 (2013), the
 24 United States Supreme Court concluded that the Martinez holding
 25 applies "where, as here, state procedural framework, by reason of
 26 its design and operation, makes it highly unlikely in a typical
 27 case that a defendant will have a meaningful opportunity to raise
 28 a claim of ineffective assistance of trial counsel on direct
 appeal[.]"

29 ³ On October 24, 1994, a jury convicted Petitioner of
 30 second degree robbery and evading a peace officer. The trial
 31 court found true the special allegations that Petitioner had
 32 suffered two prior or serious felony convictions and had served
 33 three prior prison terms. On December 13, 1994, the trial court
 34 sentenced Petitioner to prison to a total of 36 years to life.
 35 (See Donald Redick, a.k.a. Donald Wright v. C.A. Terhune, et al.,
 36 Case No. CV 99-2338-HLH (CT); Docket No. 31 at 2).

1 and expressly" rely on an independent and adequate state law
2 ground which would bar federal review of Petitioner's claim.
3 (Petition at 1-14).

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5 On March 5, 1999, Petitioner filed a Petition for Writ of
6 Habeas Corpus, in which he challenged the same 1994 convictions.
7 See Donald Redick a.k.a. Donald Wright v. C.A. Terhune, et al.,
8 Case No. CV 99-2338-HLH (CT); Docket Entry No. 1 ("the prior
9 habeas action"). On September 29, 1999, the Court issued an
10 Order and Judgment denying the habeas petition with prejudice as
11 time-barred, in accordance with the recommendations of the
12 Magistrate Judge. (Id.; Docket Entry Nos. 37-38). On January 6,
13 2000, the Court denied Petitioner a Certificate of Appealability.
14 (Id.; Docket Entry No. 44). On April 26, 2000, the Ninth Circuit
15 Court of Appeals denied Petitioner's request for a Certificate of
16 Appealability. (Id.; Docket Entry No. 48).

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18 On July 20, 2014, Petitioner filed a Petition for Writ of
19 Habeas Corpus by a Person in State Custody, pursuant to 28 U.S.C.
20 § 2254, in which he challenged the same 1994 convictions. See
21 Donald Gebe Wright v. Ron Rackley, Case No. CV 14-5922-SVW (AS);
22 Docket Entry No. 1. On February 2, 2015, the Court issued an
23 Order and Judgment denying and dismissing that habeas petition
24 without prejudice as an unauthorized, successive petition. (Id.;
25 Docket Entry Nos. 14-15). On February 27, 2015, the Court denied
26 Petitioner's motion for relief from Judgment pursuant to Fed. R.
27 Civ. P. 60(b)(6). (Id.; Docket Entry No. 18). On March 26,
28 2015, the Court denied Petitioner's request for a Certificate of

1 Appealability. (*Id.*; Docket Entry No. 21). On September 18,
2 2015, the Ninth Circuit Court of Appeals denied Petitioner's
3 request for a Certificate of Appealability. (*Id.*; Docket Entry
4 No. 26).

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6 DISCUSSION

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8 The Antiterrorism and Effective Death Penalty Act of 1996
9 ("AEDPA"), enacted on April 24, 1996, provides in pertinent part
10 that:

11 (a) No circuit or district judge shall be
12 required to entertain an application for a writ of
13 habeas corpus to inquire into the detention of a
14 person pursuant to a judgment of a court of the
United States if it appears that the legality of such
detention has been determined by a judge or court of
the United States on a prior application for a writ
of habeas corpus, except as provided in §2255.

15 (b)(1) A claim presented in a second or
16 successive habeas corpus application under section
2254 that was presented in a prior application shall
17 be dismissed.

18 (2) A claim presented in a second or successive
19 habeas corpus application under section 2254 that was
not presented in a prior application shall be
20 dismissed unless--

21 (A) the applicant shows that the claim relies on
22 a new rule of constitutional law, made retroactive to
cases on collateral review by the Supreme Court, that
was previously unavailable; or

23 (B)(i) the factual predicate for the claim could
not have been discovered previously through the
24 exercise of due diligence; and

25 (ii) the facts underlying the claim, if proven
and viewed in light of the evidence as a whole, would
26 be sufficient to establish by clear and convincing
evidence that, but for constitutional error, no
27 reasonable fact finder would have found the applicant
guilty of the underlying offense.

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(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a Petition for Rehearing or for a Writ of Certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section. 28 U.S.C. § 2244.

28 U.S.C. § 2244(b)(3) "creates a 'gatekeeping' mechanism for the consideration of second or successive applications in district court. The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. § 2244(b)(3)(A)." Felker v. Turpin, 518 U.S. 651, 657 (1996).

The instant Petition and the prior habeas action both challenge Petitioner's custody pursuant to the same 1994 judgment

1 entered by the Los Angeles County Superior Court. Accordingly,
2 the instant Petition, filed on December 15, 2015, well after the
3 effective date of the AEDPA, is a second or successive habeas
4 petition for purposes of 28 U.S.C. § 2244. Therefore, Petitioner
5 was required to obtain authorization from the Court of Appeals
6 before filing the present Petition. See 28 U.S.C. §2244(b)(3)(A).
7 No such authorization has been obtained in this case.

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9 Moreover, the claim asserted in the instant Petition does not
10 appear to fall within the exceptions to the bar on second or
11 successive petitions because the asserted claim is not based on
12 newly discovered facts or a "a new rule of constitutional law,
13 made retroactive to cases on collateral review by the Supreme
14 Court, that was previously unavailable." Tyler v. Cain, 533 U.S.
15 656, 662 (2001). However, this determination must be made by the
16 United States Court of Appeals upon a petitioner's motion for an
17 order authorizing the district court to consider his second or
18 successive petition. 28 U.S.C. § 2244(b); see also Burton v.
19 Stewart, 549 U.S. 147, 157 (2007) (where the petitioner did not
20 receive authorization from the Court of Appeals before filing
21 second or successive petition, "the District Court was without
22 jurisdiction to entertain [the petition]"); Barapind v. Reno, 225
23 F.3d 1100, 1111 (9th Cir. 2000) ("[T]he prior-appellate-review
24 mechanism set forth in § 2244(b) requires the permission of the
25 court of appeals before 'a second or successive habeas application
26 under § 2254' may be commenced."). Because Petitioner has not
27 obtained authorization from the Ninth Circuit Court of Appeals,
28 this Court cannot entertain the present Petition. See Burton v.

1 Stewart, supra.

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3 **ORDER**

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5 Accordingly, IT IS ORDERED that the Petition be dismissed
6 without prejudice.

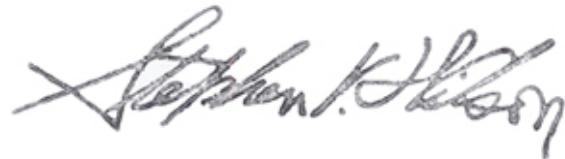
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8 LET JUDGMENT BE ENTERED ACCORDINGLY.

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10 DATED: June 29, 2016

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STEPHEN V. WILSON
13 UNITED STATES DISTRICT JUDGE

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